United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 74-1194

(To Be Argued by Howard A. Heffron)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT L. WOLF,

Appellant.

Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I.

THE TRIAL JUDGE'S REFUSAL TO GRANT A CONTINUANCE WITHOUT A "SEARCHING INQUIRY" INTO THE REASONS FOR A CHANGE OF DEFENSE COUNSEL CONSTITUTED AN ABUSE OF DISCRETION VIOLATIVE OF DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS.

1. *The Inapplicability of the "Farce and Mockery" Standard.* Embraced within the Sixth Amendment's guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel

for his defense" are two distinct rights: (a) the accused's right to the assistance of counsel of his choice and (b) the accused's right to the effective assistance of counsel. The government avoids addressing itself to the primary issue presented for review – whether "the trial judge violated defendant's Sixth Amendment right to *counsel of his choice*" (App. Br. 2) (emphasis added); instead, the government addresses its argument solely to the point that "Wolf was not deprived of the *effective assistance of counsel*" (Gov't Br. 11) (emphasis added). As a result of its misreading of the issue involved, the government formulates as "the ultimate question . . ., whether the representation of Wolf by Appleman was so poor as to have made the trial a 'farce or mockery of justice' or was 'shocking to the conscience of the Court' " (Gov't Br. 14).

But the right to counsel of one's choice and the right to the effective assistance of counsel are two distinct rights and *are measured by two different standards.* It is true that, in the Second Circuit, the right to the effective assistance of counsel has been measured by the "farce," "mockery of justice," or "shocking to the conscience" standard;[1] the right to counsel of one's choice is not measured by that standard, however. This distinction between

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[1] Other Circuits have rejected the standard adhered to by this Court. Thus, the District of Columbia Circuit asks only whether "gross incompetence blotted out the essence of a substantial defense" (*Scott v. United States*, 427 F.2d 609, 610 (1970)); the Third Circuit, whether counsel's performance was at the level "of normal competency" (*Moore v. United States*, 432 F.2d 730, 737 (1970)); the Fifth Circuit, whether counsel was "reasonably likely to render, *and rendering* reasonably effective assistance" (*MacKenna v. Ellis*, 280 F.2d 592, 599 (1960), *cert. denied*, 368 U.S. 877 (1961)); and the Sixth Circuit, whether defense counsel performed "at least as well as a lawyer with ordinary training and skill in the criminal law" (*Beasley v. United States*, 491 F.2d 687, 696 (1974)).

the two rights and their standards of measurement is made clear in two cases relied upon by the government (Gov't Br. 14, 21) – *United States v. Sanchez*, 483 F.2d 1052, 1055-56, 1057 (2d Cir. 1973), and *United States v. Bentvena*, 319 F.2d 916, 934-35, 935-37 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U.S. 940 (1963). As this Court stated in *Sanchez* (483 F.2d at 1056-57) (emphasis added):

> "Appellant alleges that he was *denied counsel of his own choosing*, when the court permitted Mr. Brown to represent him, since he had manifested his desire not to be represented by Mr. Brown when he retained Mr. Santos as his attorney.
>
> * * * *
>
> "It ill behooves appellant to [so] argue on appeal . . . when in fact, the record shows that he consented to the arrangement and that both his retained and appointed counsel jointly represented him at trial.
>
> "Equally without merit is appellant's *second Sixth Amendment argument, wherein he alleges that he was deprived of the effective assistance of counsel*. . . .
>
> "In situations wherein a defendant alleges ineffective assistance of counsel, we must determine whether counsel's overall representation of defendant (whether through counsel's own performance, or as it is affected by the actions of the trial court) was 'so woefully inadequate "as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."' [Citations omitted.]

"Reading the record as a whole, we cannot [so] conclude . . . ."

Yet, the government persists in ignoring the distinction and willy nilly invokes "ineffective assistance of counsel" cases, such as *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971), to bolster its fallacious argument (*see, e.g.*, Gov't Br. 14, 17, 18).

2. *The Standard for Counsel of One's Choice Cases.* In cases involving the right to counsel of one's choice, the usual request by a defendant to the court is for a reasonable continuance so that the defendant may secure new counsel and so that new counsel, in turn, will have sufficient time to prepare adequately for trial. Any arbitrary denial of such a continuance would violate the Fifth Amendment guarantee of due process and the Sixth Amendment guarantee of the assistance of counsel. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *United States v. Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966). In resolving the issue, the appellate court must balance the desire for expedition of the trial against the right to present a proper defense through counsel of one's choice. In so doing, the court must look especially at "*the reasons presented* to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (emphasis added).

In applying these principles, this Court has held that, if the reasons for changing counsel are sufficiently serious on their face, then the trial judge is to be considered as having been under a duty to make a "searching inquiry." *United States v. Morrissey*, 461 F.2d 666, 669 (2d Cir. 1972). "Without more, this failure to inquire . . . would constitute error sufficient for reversal of the judgment of conviction," this Court has maintained (*id.* at 670). Whether or not there is "more," depends upon a review of the

entire record as a whole. Contrary to the government's position (*see* Gov't Br. 14), however, the review of the record is *not for purposes of determining whether the trial was a "farce or mockery of justice" or "shocked the conscience of the court"*; rather *it is to determine whether the reasons for a change of counsel presented by defendant had been "incorrect" and "insubstantial"* (*id.*).

The reason why the right to counsel of one's choice is tested by a different standard from that applied to the right to effective assistance of counsel should by now be obvious. The issue of ineffective assistance of counsel is raised on appeal and is usually an afterthought developed by appellate counsel or the defendant on the basis of the trial record and with the benefit of hindsight. The district judge has not had the opportunity to concern himself with the question, much less rule on it. Consequently, the appeals courts early developed a rigorous standard to test the validity of the issue. In contrast, when the right to counsel of one's choice is raised as an issue on appeal, it is a question which has already been duly presented to the trial judge for a ruling – in most instances prior to trial. The defendant does not rely on hindsight; the trial judge has had the opportunity to consider all the pertinent factors before trial begins; and the appeals court has the benefit of reviewing the ruling of the lower court, rather than deciding the issue presented as an original matter. If the standards for the two rights were the same, then the individual's right to counsel of his choice would have little value since it could be overridden if the trial were conducted by any counsel capable of providing minimally adequate representation under the "farce or mockery of justice" standard.

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3. *The Reasons Given for the Change of Counsel.* In the present case, defendant Wolf requested a continuance so that he could retain new counsel on the basis of his counsel's lack of general, as well as criminal, trial experience, of his counsel's failure to prepare adequately for trial, and of the increasing disagreement, conflict, hostility, and failure of communication between defendant and counsel.[2]

At the pretrial conference held on the change of counsel request, defense counsel admitted the growing failure of communication between his client and himself (J.A. 29; *see* J.A. 26) and took no issue with defendant's detailed allegations of lack of experience and lack of preparation (*see* J.A. 26). Similarly, the government attorney raised no substantive reasons for denying the continuance (*see* J.A. 20-21, 28-29).

Appellant's detailed analysis of the trial transcript (*see* App. Br. 9-27) shows clearly that there was hostility and lack of communication between defendant and counsel; that defense counsel had not adequately prepared for trial; and that underlying everything was the problem that defense counsel was so grossly inadequate that he could not present a coherent theory of defense to the jury and was unable to cope effectively with documentary evidence, to formulate questions for cross and direct examination, and to offer correctly appropriate objections and motions to strike.

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[2] A detailed analysis of these reasons is set forth in Part 1 of the Statement of the Case in Appellant's Brief (pp. 3-9). This was the first defense request for an adjournment since the indictment was returned (*see* J.A. 1-2).

4. *The Disingenuousness of the Government's Challenge.* On appeal, the government concedes that "[t]he examples chosen by Wolf do show his counsel's lack of experience in trial practice" (Gov't Br. 16).[3] The government further does not deny the conflict and hostility between defendant and his counsel. Indeed, the government's only purported point of contention is its challenge to defendant's claim of lack of trial preparation. The challenge, however, is not to the substance of the claim but rather to whether the lack of preparation resulted in "substantial prejudice" (Gov't Br. 16). Apart from the fact that "substantial prejudice," just as "farce and mockery," is not an applicable test in a case involving the right to counsel of one's choice,[4] the government's challenge is highly disingenuous.

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[3] The government attempts to offset its concession by pointing to the so-called "assistance" defense counsel obtained from Max Fruchtman. Mr. Fruchtman's desultory presence at trial reflected defense counsel's own awareness of his lack of trial experience and highlights the need for the trial judge to have conducted an inquiry into the defendant's allegations in advance of trial. Recognizing that the record virtually destroys the Fruchtman argument (*see* App. Br. 10 n. 7), the government invokes the consultations relating to trial strategy between Fruchtman and counsel, which "by their very nature remain[ed] private" (Gov't Br. 16). A cursory review of the record shows that these hypothetical consultations did not discernibly improve the defense presentation.

[4] "[W]here there has been complete disregard of the defendant's right to choose his own counsel, prejudice will be assumed." *Releford v. United States*, 288 F.2d 298, 302 (9th Cir. 1961); *accord*, *United States v. Johnston*, 318 F.2d 288, 291 (6th Cir. 1963).

(a) *No Pretrial Motions.* Although it is customary for defense counsel in tax evasion cases to seek a detailed bill of particulars and also pretrial discovery of documentary evidence, defense counsel made no pretrial motions of any kind.

(b) *No Subpoenaeing of Records.* In a bank-deposits case, defense counsel would be expected to subpoena bank, employer, travel, and other records which would show the deposit of such non-income items as transfers, travel reimbursements, repayment of debts, proceeds of insurance, or accident claims, in order to reduce the tax deficiency claimed by the government and to use the records as the basis for the preparation of a counter-analysis. Defense counsel, however, subpoenaed no records or documentary evidence from any source (*see* App. Br. 24-25, 31). The fact that some of these records were finally produced at trial and that information from them was included in the government exhibits (*see* Gov't Br. 17-18) does not detract from the fact that defense counsel did not adequately prepare in advance for the trial as evidenced by his failure to subpoena these records. Obviously, a defense which depends upon the records which happen to be produced at trial by the other side is gravely deficient.

(c) *No Interview of Crucial Witnesses.* It is elementary in a tax fraud case that the accountant who prepared the tax returns in question and the bookkeeper who worked on the records are key potential witnesses to be interviewed before trial. Defense counsel did not do so. Again, the government states disingenuousnessly that "it is not known whether these individuals would have consented to be interviewed" (Gov't Br. 18). If they had refused to see defense counsel, that fact in itself would have been highly significant to guide defense preparation. The point

is that counsel did not *even attempt* to interview the witnesses prior to trial (Tr. 2; *see* J.A. 21).[5] Whatever the value of the Jencks Act material presented to defense during trial for purposes of cross-examination, such material cannot substitute for the building of a defense case before trial.

(d) *No Counter Bank-Deposits Analysis.* Although the government concedes that a defense counter bank-deposits analysis was not presented, it insists that "the record is silent as to whether a defense counter-bank deposits analysis was prepared before the defense opened its case" (Gov't Br. 17). The record, however, is clear that, at the pretrial conference, defendant had stated without contradiction that, as of that date – six days before trial – "no detailed, sophisticated counter analysis ha[d] been prepared for each and every year in question to meet the government's bank deposit analysis" (J.A. 19). Moreover, on the opening day of trial, defendant had further stated, without contradiction, that the defense had not engaged an outside accountant until only three days prior to trial (Tr. 2). The government is further not helped by its *ipse dixit* that such a counter analysis "would have been a useless gesture" (Gov't Br. 17).[6] Since none had been prepared, we just do not know what such an analysis could

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[5] The defendant had told Judge Wyatt prior to trial that the accountant had not been interviewed (J.A. 21), and, at the opening of trial, to no avail, he again reminded the judge that "representatives of the defense have not interviewed the defendant's accountant nor bookkeeper" (Tr. 2).

[6] Among the more glaring inaccuracies in the government's summary of its case are the statements that the defendant "cashed large quantities of his patients' fee checks" (Gov't Br. 4), and that "much of the approximately $184,000 deposited in the Barclays account during 1968 and 1969" was identified as medical income (Gov't Br.

(continued)

have uncovered. The fact is, as we state in our main brief, that "[a] major element in defense preparation in a bank-deposits case is the counter-analysis of all deposits to make certain that proper credit for all non-income items has been given and to offer a defense interpretation for questionable items" (App. Br. 31). This just was not done. The fact that "Appleman himself was an accountant and a former Special Agent with IRS" does not make him "more competent to make judgments that the average lawyer" in determining "the utility of performing or presenting a counter-analysis" (Gov't Br. 17). A proper defense of any bank-deposits tax fraud case should include a counter bank-deposits analysis.[7]

(e) *The Possible W-2 and Form 1099 Defense.* A vital aspect of the government's case was the contention that the accountant, Edelstein, had prepared the alleged false entries

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[6] (continued) 5-6). In fact, according to the government's own analysis, during the four years involved, a total of only $4,183 in alleged patients' checks were cashed and charged (rightly or wrongly) to professional income (*see* G. Ex. 549-52). Similarly, the government's own analysis of the Barclays account shows that well over half of the deposits were specifically identified by the government as deriving from non-professional sources, and almost all of the balance was lumped by the government without specific identification in the medical income category (*see* G. Ex. 528-29).

[7] One small example in the record at bar is illustrative. The government had simply lumped in 1968 professional income a large deposit in the Chemical Bank of $1305 without further identification (Tr. 667; G. Ex. 526, p. 6). A counter-analysis would have sought to identify the source of this deposit and, if a non-income item, remove it from the computation. The same scrutiny would have been applied to other deposits charged by the government in its analysis as unidentified professional income (*see* G. Ex. 524-27).

on the return on the basis of faulty information supplied by the defendant. If so, the argument ran, the jury would be warranted in concluding that the defendant bore responsibility for them. The defendant testified, however, that he had supplied Edelstein with a listing of checking account deposits for each year, adjusted for income reflected on W-2's and Form 1099's,[8] which he had also forwarded (Tr. 795, 799-780). If the total of W-2 and Form 1099 income, when added to the other income figures supplied by the defendant to his accountant, had come close to the government's claimed deficiency (as modified by a defense counter bank-deposits analysis), this fact would have raised the question whether Edelstein had misused or misinterpreted data furnished by the defendant, which could have led to the preparation of a substantially accurate return. Edelstein testified that the defendant had submitted W-2's and Form 1099's to him (Tr. 367). However, counsel evidently had not obtained copies of the Form 1099's which had been furnished to the taxpayer by the various concerns or insurance companies that had utilized his services during the tax years in question. The IRS did not regard the obtaining of Form 1099's from all possible sources as its responsibility; nor did the government introduce the Form 1099's as part of its case (Tr. 679, 712). Rather, it was incumbent on defense counsel to obtain the Form 1099's for his case.[9] Defense counsel's lack of preparation

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[8] A 1099 form is an information return showing the amount of income received as an independent contractor, rather than as an employee; a W-2 is a return of salary income.

[9] For example, on the basis of the figures available at trial from the United Medical Services and ITT, it is plain that many thousands of dollars of the claimed deficiency could have been accounted for by this defense theory. Thus, over the years 1966-69, UMS had paid out in excess of $25,000 to the defendant (*see* G. Ex. 62),

(continued)

and experience prevented proper investigation and development of this point.

(f) *Evidence of Marital Difficulties.* Defense counsel was never able to persuade the trial judge to admit evidence of defendant's marital difficulties as bearing on wilfullness. The trial judge unquestionably had discretion to *admit* this evidence. Counsel's offer of proof and efforts at advocacy, however, were so plainly inept that it is not surprising the judge could not be moved from his position that, only if insanity had been pleaded as a defense, would such proof be admissible – a position which, we submit, was incorrect (*see* Tr. 449-50; App. Br. 26-27 & n. 14).

(g) *Counsel's Reflection on the Defense Case.* Defense counsel's "lack of experience in trial practice" (Gov't Br. 16) – painfully revealed at trial in the repeated sustaining of the prosecution objections (Gov't Br. 15), in the judge's obvious efforts to provide defense counsel with on-the-job training (*see, e.g.*, App. Br. 15-16), and in counsel's inability to formulate questions and interpose proper objections (*see* App. Br. 18-22) – could not fail to have had a disparaging impact on defense counsel and the defense case.

(h) *Conflict of Defendant and Counsel.* The defendant had so little confidence in his lawyer that he testified against his advice (Tr. 783), thereby confirming the conflict

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[9] (continued) and ITT had paid out almost $10,000 during the same period (Tr. 167-68). There were other organizations for whom the defendant had also rendered services during the years in issue (*see* Tr. 708-710) and which may have issued Form 1099's.

which had arisen before trial (*see* App. Br. 6-8) and which continued throughout the trial. This circumstances alone prevented defense counsel from serving effectively in a case where the defense position had to rest so heavily on the defendant's full collaboration with counsel.

(i) *Exceptions to the Charge.* Defendant's lack of confidence in trial counsel was so great that he obtained advice from another lawyer and on that basis himself interposed an exception to the charge (Point II on this appeal) which his own trial counsel did not perceive (Tr. 1026, 1029). Ignobly, the government now argues that Dr. Wolf did not follow Rule 30, Fed. R. Crim. P., and that therefore, the exception was not properly taken (Gov't Br. 23). The government's point is a graphic example of the damage that comes from representation by inexperienced and unprepared counsel.

5. *The Lack of Timeliness and Lack of Good Faith Challenges.* The government on appeal also argues that "Wolf had ample time to retain substitute counsel and failed to do so" (Gov't Br. 11), and that "Wolf's good faith in his representations to the Court was open to serious question" (Gov't Br. 13). The trouble with these arguments is that they are afterthoughts, conceived as contentions on appeal, which were not presented to the district judge when the time was ripe. Had questions of timeliness and good faith been seriously entertained by the government, they should have been addressed to the trial court as an initial matter when the request for a continuance was pending. In this way, the judge would have been able to conduct a timely and "searching inquiry" as to these questions, as well as to the reasons for change of counsel presented by defendant. Otherwise, how else would one have been able to determine whether there was

in fact a delay between the time defendant decided to change attorneys and the time the request to the judge was made, or what the background of discussions leading up to the correspondence with Judge Wyatt had been (*see* J.A. 5-12). It therefore ill behooves the government to raise the issues here where no evidence on matters outside the record is available. All that is in the record is defendant's uncontradicted assertions that a number of prospective defense counsel had been willing to try the case had time been given them for preparation (J.A. 25).

The government further argues that all Wolf had to do was "discharge Appleman on October 24 or sooner, and retain whomever he wished" (Gov't Br. 12). But clearly, any change needed approval by the Court. Moreover, Mr. Appleman's letter to Judge Wyatt of October 30, 1973 (J.A. 6), indicates that Dr. Wolf had initially put the matter of arranging for a continuance and for new trial counsel into the hands of his lawyer. The six-day hiatus between October 24, when Dr. Wolf is said to have made his wishes known to counsel, and October 30, the date of the letter to the judge, was obviously chargeable to counsel's lack of diligence and inexperience.[10] Immediately thereafter, when Dr. Wolf learned that the judge had not granted the request for adjournment, Dr. Wolf directed Appleman to withdraw (J.A. 8) and promptly wrote his own letter to the judge, explaining his reasons for wishing to change counsel (J.A. 10-11).

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[10] Mr. Appleman's letter (J.A. 6), upon which the government now relies, also makes the point that, only after October 12, 1973, when the government disclosed its case, and only after subsequent "intensive discussions" with counsel about the extent of the government's case, was defendant in a position to decide he needed new counsel (*see* App. Br. 5 n. 5).

As to the question of good faith, the government again stresses defendant's invocation of the Fifth Amendment before the Grand Jury, a purported failure to accept registered or certified mail, and broken appointments with the IRS (Gov't Br. 13), despite its previous admission at the pretrial conference that such factors were of "no consequence" with respect to the request for a continuance (J.A. 21); obviously such matters did not bear on the issue of competence of counsel put before Judge Wyatt.

The government further speaks of defendant's "self-serving claim that he only learned some three or four weeks before trial that his retained counsel . . . had never before tried a tax case" and of defendant's obscuring "the fact that Mr. Appleman was an accountant and former IRS Special Agent and was thus substantially experienced in tax matters" (Gov't Br. 13). The fact is, however, that the defendant, without contradiction, stated (J. A. 23) (emphasis added): "I only recently *within the past week or 2* learned that my present counsel had never tried a tax case, and I am not even sure whether he has ever tried any case in the court." Moreover, counsel's background as an accountant and IRS agent did not make up for his lack of trial experience; in this regard, the government itself has conceded on appeal defense "counsel's lack of experience in trial practice" (Gov't Br. 16). So, too, the government's attempt to argue that counsel's "silence in the fact of such accusations" – although he had an opportunity to speak (Tr. 26) – was not tantamount to an admission of their truth (Gov't Br. 13) is untenable in the face of the government's own concession as to counsel's inexperience (Gov't Br. 16); counsel's own admission as to the hostility between, and conflict with,

defendant (J.A. 26, 29); and the confirmation of defendant's allegations in the trial record (*see* App. Br. 9-27).[11]

* * * *

In sum, it is clear from our analysis of the transcript of the pretrial conference, of the trial record, and of the government's brief on appeal that the reasons for change of counsel offered to the court below were not "incorrect," and not "insubstantial." *United States v. Morrissey*, 461 F.2d 666, 670 (2nd Cir. 1972). Under the circumstances, the trial judge's refusal to grant a continuance without a "searching inquiry" into the reasons for a change of defense counsel constituted an abuse of discretion violative of defendant's Fifth and Sixth Amendment rights.[12]

6. *The Broader Significance of the Issue Presented.* In recent years, the judiciary has been expressing serious concern over "the increasing number of instances of poor legal representation. . . ." Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 176 (1974). Thus,

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[11] The government attempts to make much of defendant's "having run off to Europe for a conference for several weeks between indictment and trial" and placing the onus of his doing so on counsel (Gov't Br. 13). The fact is that the conference was an "international symposium involving the use of radioactivity in medicine," that defendant had been requested by the Department of State and the Atomic Energy Commission to represent the government at the symposium (J.A. 17), and that defendant "repeatedly asked counsel whether I should accept the nomination and was told that I should indeed accept the nomination and should indeed attend . . . the proceeding in Europe, and that my presence . . . for the [trial] preparation was not necessary" (J.A. 18). Counsel did not challenge this statement.

[12] When the government requested a brief continuance because it was not ready for trial, this Court did not hesitate to hold that the denial of the continuance was an abuse of discretion. *United States v. Cacciatore*, 487 F.2d 240 (2nd Cir. 1973).

Chief Judge Kaufman has decried the fact that "[t]oo many lawyers come into court today with only a diploma to justify their claims to be advocates" *(id.)*, and the Chief Justice has forcefully urged that "[t]he trial of an important case is no place for on-the-job training of amateurs. . . ." Burger, *The Special Skills of Advocacy*, the Fourth John F. Sonnett Memorial Lecture, at 10 (1973). This Court itself has joined in the call for better advocacy. In *United States v. Weiss*, 491 F.2d 460, 469 (2d Cir. 1974), the Court stated:

> "Admission to the District Court bar of a lawyer who has never before tried a criminal case does not *ipso facto* qualify him to act as defense counsel in a complicated conspiracy trial. The proper procedure . . . was to appoint a lawyer qualified to serve . . . ."

On this record, a serious challenge to the qualifications of defense counsel as a trial advocate was presented to the district court well in advance of the actual trial date in a setting which made it plain that no attempt to obstruct the administration of justice was involved. Regrettably, the court was not sufficiently sensitive to the issue to conduct the brief inquiry required for full and open consideration. At minimal cost in judicial time and inconvenience, that inquiry would have done much to improve the quality of justice in the district court trial and might have obviated the need for this Court to consider this appeal.

We submit that, under the Constitution as well as in the exercise of this Court's supervision of the administration of criminal justice, this Court should hold that the proper procedure below was for the judge to hold the "searching inquiry," rather than to force the case out to

trial, and that in the circumstances here presented the judgment of conviction should be vacated and the cause remanded for a new trial.[13]

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[13] Once the Court concludes that the defendant was deprived of his Sixth Amendment right to counsel of his choice, the case should be remanded for a new trial; the Court need not inquire further into the "effectiveness" of counsel in the constitutional sense. The government, however, has chosen to couch its answering brief in the form of an argument that Dr. Wolf was not deprived of the effective assistance of counsel. We disagree completely. If the Court should reach the issue, however, it should hold that Dr. Wolf was indeed denied the effective assistance of counsel.

The record presents the spectacle of a criminal tax evasion trial defended by counsel who interviews no key potential witnesses; subpoenas no records; prepares no counter bank-deposits analysis; is in conflict with and cannot communicate with his client; has no trial experience; cannot frame proper questions, refresh recollection, offer documentary evidence, or voice objections properly; is constantly assisted by the court – in short, by counsel to whom the structure of trial advocacy is so alien that he cannot build a coherent defense case and secure and present evidence to support it. This is not a record of mere tactical errors or strategic miscalculations about which conscientious defense lawyers might differ. Rather, it reflects defense counsel who has failed to conduct elementary pretrial investigation and preparation and plainly lacks the elementary skills and experience required to try a tax fraud case in the United States District Court. *Cf. Caraway v. Beto*, 421 F. 2d 636 (5th Cir. 1970). The government's emphasis on defense counsel's background as an IRS agent only serves to muddy the waters. Knowledge of substantive tax law and procedure – assuming counsel had these – as any tax expert knows, is no substitute for the specialized knowledge and experience of the trial advocate.

We submit that on this record the Court can well hold that defendant was deprived of the effective assistance of counsel within the "farce and mockery" standard that has been applied in this Circuit. In this connection, we note that the Sixth Circuit has recently held that the "farce and mockery" test is a "conclusory description" of the results in cases for which more objective criteria

(continued)

II.

THE CHARGE TO THE JURY WAS UNFAIR IN SINGLING OUT THE DEFENDANT'S INTEREST BUT IN NOT MAKING EXPRESS REFERENCE TO THE INTEREST OF ANY GOVERNMENT WITNESS.

The government concedes that the court's charge made "[n]o express reference to any government witness" (Gov't Br. 23); it then goes on to argue that the usual abstract charge on the subject of witness credibility obviated the need for any such reference.

Perhaps the government's position would be tenable if the charge, while failing to refer to the possible motives to falsify of key government witnesses who were plainly not disinterested, had not expressly singled out the testimony of the defendant, his interest, and possible motive to falsify. But once the judge elected to draw the jury's attention specifically to the defendant's interest and its impact on the credibility of his testimony, fundamental fairness required that he advise the jury explicitly that the government had also presented key witnesses who had an interest in the prosecution and that their credibility was affected by their interest. In so doing, the court would have issued a balanced charge impartially drawing the jury's attention to legitimate issues of credibility raised in the cases of both sides. Unfortunately, the trial judge singled out only the defendant's testimony as potentially

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[13] (continued) are needed. *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). In *Beasley*, the court held that the Constitutional right to effective assistance of counsel includes the following consideration (491 F.2d at 696): "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his clients interest, undeflected by conflicting considerations." Both by way of omission and commission, defense counsel did not meet this standard.

untrustworthy.[14] In the context of this case and in view of the great weight the jury attaches to the court's "lightest word" (*Reagan v. United States*, 157 U.S. 301, 310 (1895)), the trial judge's action was manifestly unfair.

The government's reliance on this court's decision is *United States v. Mahler*, 363 F.2d 673 (2d Cir. 1966), is quite misplaced. In *Mahler*, there had been no objection below to the charge, and the Court upheld instructions to the jury which specifically referred to the defendant's interest because it was *balanced* with references (363 F. 2d at 678)

> – "[i] that key government witnesses also had an interest in the outcome of the case,
>
> – [ii] that their testimony and Mahler's both had to be 'weighed with a great deal of care, and
>
> – [iii] that the jury had to determine whose version to accept."

These balancing elements were omitted from the charge at bar. The present case is therefore the one posited by *Mahler* that "such a charge [on the interest of the defendant] may be unfair in a given context" (363 F.2d at 678).

Although the government cites *United States v. Sullivan*, 329 F.2d 755 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964) (Gov't Br. 26), that decision offers no support for its position here. *Sullivan* does not discuss the need for

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[14] This effect was heightened by the judge's explicit reference to the possibility that the defendant had made false statements to IRS (Tr. 1022) and his failure to refer expressly to the effect to be given the bookkeeper's admitted false statements to IRS (Tr. 314, 326-29; *see* Gov't Br. 4 n. *).

a balanced charge when both sides present interested witnesses. There is no indication that *Sullivan* had raised the point, and, so far as the opinion shows, the government's case was based on the testimony of disinterested witnesses. *United States v. Sclafani*, 487 F.2d 245, 257 (2d Cir.), *cert. denied*, 94 S.Ct. 495 (1973), does not discuss the issue of the need for a balanced charge raised here but does cite *Mahler* with approval. The other cases cited by the government in its brief, at pp. 24-25, do not even involve the consideration of a charge on the subject of the defendant's interest.

Thus, since the charge here presented an unbalanced picture to the jurors on the various issues of credibility before them and breached the judges duty to be "impartial [as] between the government and the defendant" (*Reagan v. United States*, 157 U.S. 301, 310 (1895)), the charge was fundamentally unfair under the *Mahler* rationale.

CONCLUSION

For the foregoing reasons and for the reasons set forth in our main brief, this Court should reverse the judgment of conviction below and remand the cause for a new trial.

Respectfully submitted,

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No. 74-1194

UNITED STATES OF AMERICA,
Appellee

v.

ROBERT L. WOLF,
Appellant

Appeal from the United States District Court
For the Southern District of New York

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Brief for Appellant was hand delivered by messenger to Bobby C. Lawyer, Esquire, Assistant United States Attorney, United States Court House, Foley Square, New York, New York, Attorney for the United States, this 13th day of May, 1974.

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